IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
(HOUSTON DIVISION)

In re ENRON CORPORATION SECURITIES LITIGATION
This Document Relates To: MARK NEWBY, *et al.*, Individually and On Behalf of All Others Similarly Situated, Plaintiffs, -v.- ENRON CORP., *et al.*, Defendants.

Civil Action No. H-01-3624
(Consolidated)

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF DEFENDANTS CITIGROUP INC., CITIBANK N.A., SALOMON SMITH BARNEY INC. AND SALOMON BROTHERS INTERNATIONAL LIMITED TO DISMISS CERTAIN CLAIMS ASSERTED IN PLAINTIFFS' FIRST AMENDED CONSOLIDATED COMPLAINT

TO THE HONORABLE MELINDA HARMON, UNITED STATES DISTRICT JUDGE:

Defendants Citigroup Inc., Citibank N.A. ("Citibank"), Salomon Smith Barney Inc. ("SSB"), and Salomon Brothers International Limited ("SBIL") (collectively, "Citigroup"), submit this memorandum of law in support of their motion, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss (i) Count IV of the First Amended Consolidated Complaint for Violation of Securities Laws (the "Amended Complaint;" cited herein as "Am. Cplt. ¶ _") in its entirety, (ii) Count I to the extent that

149

it arises from purchases of the securities listed in paragraph 641.2 of the Amended Complaint (referred to in the Amended Complaint and herein as the "Foreign Debt Securities"); and (iii) all counts to the extent they are asserted against Citibank, SSB and SBIL.

PRELIMINARY STATEMENT

Plaintiffs attempt in the Amended Complaint to sweep into this case nine privately-offered securities (seven of which allegedly involved Citigroup) not covered by any of the previous iterations of the complaint. These securities, issued not by Enron but by a variety of issuers, were allegedly dependent in various different ways upon Enron's credit rating and ability to pay. Plaintiffs assert claims based upon these securities under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "'33 Act") (the First Cause of Action) and Sections 12(a)(2) and 15 of the Securities Act of 1933 (the "'34 Act") (the Fourth Cause of Action). Plaintiffs also assert for the first time claims against Citibank, SSB, and SBIL.

These newly-minted claims should be dismissed for three independent reasons:

First, plaintiffs lack standing to assert claims based upon the sale of the Foreign Debt securities, because none of the plaintiffs is alleged to have purchased any of them. (Indeed, plaintiffs do not allege that they purchased *any* securities issued by any of the issuers of these Securities.) It is well-settled that only a buyer or seller of securities can assert claims under Sections 10(b) or 12(a)(2), and it is not sufficient for the plaintiff to allege, as the named plaintiffs do here, that they purchased *other* securities, particularly where the securities they purchased were issued by Enron, not by the issuers of the

Foreign Debt Securities. This is not merely a matter to be deferred until class certification; rather, it is a fundamental issue of standing under the federal securities laws.

Second, plaintiffs' Fourth Cause of Action under Section 12(a)(2) should be dismissed for the separate and independent reason that these notes were issued in private offerings, not in public offerings. As the Supreme Court has expressly held, section 12(a)(2) applies only to purchases of securities in a "public offering" requiring the delivery of a prospectus. *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 571 (1995). Plaintiffs attempt to avoid this requirement by asserting that these securities were "listed and traded upon the Luxembourg stock exchange" (Am. Cplt. ¶ 641.1), but that allegation is immaterial. Plaintiffs do not and cannot allege that the notes were sold in a public offering pursuant to a prospectus, the clear prerequisite for a claim under Section12(a)(2). Accordingly, this claim, too, should be dismissed.

Third, in any event, all claims asserted against Citibank, SSB, and SBIL should be dismissed because they are barred by the applicable one-year statute of limitations. In the Consolidated Complaint filed on April 8, 2002, plaintiffs failed to assert claims against Citibank, SSB, or SBIL, although the Complaint itself showed that plaintiffs had actual knowledge of their alleged involvement in the matters at issue. The First Amended Complaint, which added claims against these defendants, was filed on May 14, 2003, more than one year after the Consolidated Complaint was filed, and more than one and one half years after Enron announced its restatement of earnings on October 16, 2001. Am. Cplt. ¶ 61. Thus, plaintiffs' claims against those defendants fall well beyond the expiration of the one year "discovery" prong of the statute of limitations and should be dismissed.

STATEMENT OF FACTS

The Amended Complaint purports to assert claims against Citigroup on behalf of purchasers of seven different Enron-related securities, for which plaintiffs allege that Citigroup acted as an underwriter or initial purchaser, as well as two such securities with which Citigroup is not alleged to have been involved. (Am. Cplt. ¶¶ 641.1-641.44, 678.) These securities (referred to in the Complaint as the Foreign Debt Securities) include a variety of securities issued by "entities related to Enron" (but not Enron itself). In particular, the Foreign Debt Securities for which Citigroup was allegedly an underwriter or initial purchaser include the following: Osprey Trust Osprey I, Inc., $1.4 bn. 8.31% Senior Secured Notes ("Osprey I"); Yosemite Securities Trust I ("Yosemite I"); Yosemite Securities Co. Ltd. ("Yosemite II"), and Enron Credit Linked Notes Trust, Enron Euro Credit Linked Notes Trust, Enron Credit Linked Notes Trust II, and Enron Sterling Credit Linked Notes Trust (collectively "ECLNs"). (*Id.*) Plaintiffs allege in conclusory fashion that repayment of each of these securities was "dependent upon Enron's credit, financial condition and ability to pay." (*Id.* ¶ 641.1.)

SSB is alleged to have been an "underwriter/initial purchaser" of four of these securities, and SBIL is alleged to have played that role with respect to three others. (*Id.* ¶ 641.2.)

Plaintiffs allege that "Plaintiffs or members of the Class" purchased these securities from the "underwriters/initial purchasers." (*Id.* ¶ 1016.4.) As is clear from both the Amended Complaint and plaintiffs' Amended Motion for Class Certification, however, none of the named plaintiffs or purported class representatives in fact purchased *any* of the Foreign Debt Securities, much less purchased them Citigroup. (Am. Cplt. ¶¶ 79-81; Lead Pl.'s Amended Mot. for Class Cert., filed May 28, 2003 at 19-24.)

Although plaintiffs describe the Foreign Debt Securities as "publicly traded securities" (*e.g.*, ¶ 641.1), they carefully do *not* allege anywhere in the 645-page complaint that they were sold in a public offering or pursuant to a prospectus. As the relevant offering memoranda make clear, these securities were sold in private placements, not in a public offering.[1] Each offering memorandum specifically states that the offering is either private and only available to qualified purchasers pursuant to Rule 144A under the Securities Act, or is issued pursuant to an exemption from, or is not subject to, the Securities Act of 1933. (Hurwitz Dec., Exhibits A, C-G (Rule 144A transaction); *id.*, Ex. B (exempted transaction, or one not subject to the Securities Act); *see also* n. 9, *infra*.)

Plaintiffs assert two claims relating to the Foreign Debt Securities: (i) in the Fourth Cause of Action, claims under Section 12(a)(2) of the 33 Act against SSB and SBIL, and under Section 15 against Citigroup Inc.; and (ii) in the First Cause of Action, claims against all of the Citigroup entities for violations of Sections 10(b) and 20(a) of the '34 Act and Rule 10b-5 in relation to the Foreign Debt Securities and other securities. (Am. Cplt. ¶¶ 992, 998.)

---

[1] The Offering Memoranda for the Foreign Debt Securities for which SSB or SBIL actual as an initial purchaser are attached to the Declaration of Jonathan H. Hurwitz, dated June 17, 2003, filed concurrently with this brief. *See* Declaration of Jonathan H. Hurwitz (hereinafter "Hurwitz Dec."), Exhibits A-G. In ruling on this motion to dismiss, the Court may consider documents referenced and relied upon in the complaint, including these offering memoranda, which are specifically cited and quoted in the Amended Complaint, ¶¶ 641.7-641.36. *In re Securities Litig. BMC Software, Inc.*, 183 F. Supp. 2d 860, 881-882 (S.D. Tex. 2001) ("The Court may also consider documents 'integral to and explicitly relied on in the complaint,' that the defendant appends to his motion to dismiss") (citing *Phillips* v. *LCI Int'l, Inc.*, 190 F.3d 609, 618 (4th Cir. 1999)).

ARGUMENT[2]

I.

PLAINTIFFS LACK STANDING TO ASSERT CLAIMS REGARDING THE FOREIGN DEBT SECURITIES BECAUSE THEY DO NOT ALLEGE THAT THEY PURCHASED THOSE SECURITIES

Claims under Sections 10(b) or 12(a)(2) are limited to purchasers or sellers of securities. *7547 Corp.* v. *Parker & Parsley Development Partners, L.P.*, 38 F.3d 211, 226 (5th Cir. 1994) (*citing Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 749, 755 (1975)) ("Standing under [§ 10(b) of the 1934 Act and Rule 10b-5] requires that a plaintiff be an actual purchaser or seller of securities who has been injured by deception or fraud in connection with the purchase or sale"); *Ratner* v. *Sioux Nat. Gas Corp.*, 770 F.2d 512, 518 (5th Cir. 1985)(holding that plaintiffs must have purchased the securities in question to have standing); *Gustafson* v. *Alloyd Co., Inc.*, 513 U.S. 561, 580-81 (1995) (holding that standing to sue under § 12(2) of 1933 Act (now codified as § 12(a)(2)) is limited to persons who purchase securities in offering).

Accordingly, a plaintiff must have actually purchased or sold the security in question in order to have standing to assert securities claims under Sections 10(b) or 12(a)(2) claims. *In re Paracelsus Corp. Secs. Litig.*, 6 F. Supp. 2d 626, 631 (S.D. Tex. 1998) (dismissing section 12(a)(2) claims because "[p]laintiffs . . . do not allege that any

---

[2] Citigroup files this motion to dismiss without waiving its argument that the Court misconstrued *Central Bank of Denver v. First Bank of Denver,* 511 U.S. 164 (1994), in its Order of December 20, 2002, and, to the extent that it is necessary to preserve the argument, Citigroup reasserts here that the complaint should be dismissed under the proper interpretation of *Central Bank* for the reasons set forth in its original Motion to Dismiss the *Newby* Complaint. *See* Memorandum of Law of Defendant Citigroup Inc. In Support of Its Motion to Dismiss, at 44-50. Since this Court's decision in *Newby*, at least one court has adopted Citigroup's interpretation of *Central*

named [p]laintiff purchased or acquired any of the . . . notes at issue."); *see also Akerman* v. *Oryx Communications, Inc.*, 609 F. Supp. 363, 377 (S.D.N.Y. 1984) (holding that the named plaintiffs had standing under Section 12(2) only to the extent each was himself a member of the sub-class on behalf of which it purported to assert claims); *Greater Iowa Corp.* v. *McLendon*, 378 F.2d 783, 789 (8th Cir. 1967) (named plaintiff stockholders lacked standing to enjoin on behalf of shareholders in defendant's voting trust and successor corporation, when the named plaintiffs had themselves not purchased the securities at issue).

In addition, "to state a claim under [Section] 12(a)(2), [a plaintiff] must have purchased [the securities] in the public offering, not the aftermarket." *Dartley* v. *Ergobilt, Inc.*, No. Civ. A. 398CV1442M, 2001 WL 313964, at *2 (N.D. Tex. March 29, 2001) (dismissing § 12(a)(2) claim despite plaintiff's argument that the securities were purchased "pursuant to and traceable to" the prospectus, because the securities were purchased in the aftermarket); *Sterling Foster & Co., Inc., Secs. Litig.*, 222 F. Supp. 2d 216, 246 (S.D.N.Y. 2002) (dismissing § 12(a)(2) claims because the plaintiffs purchased the securities in the aftermarket); *see also In re WebSecure Inc. Secs. Litig.*, 182 F.R.D. 364, 369 (D. Mass. 1998) (dismissing § 12(a)(2) claims as to underwriter defendant because "[t]he amended complaint [did] not allege that *any* of the plaintiffs purchased shares directly from [defendant]," and general language to effect that underwriter defendants sold securities directly to investors was insufficient to state claim) (emphasis in original); *Maher* v. *Durango Metals, Inc.*, 144 F.3d 1302, 1307 (10th Cir. 1998) (dismissing § 12(a)(1) claim because plaintiff had neither alleged that defendants had

---

Bank. See In re Homestore.com, Inc. Securities Litigation, 2003 WL 1227643 (C.D.

"directly sold him" the securities in question, nor that they had solicited his purchase of same); *In re JWP, Inc. Sec. Litig.*, 928 F. Supp. 1239, 1259 (S.D.N.Y. 1996)("private placement memoranda . . . are not 'prospectuses' for the purposes of a claim under [section 12(a)(2)]"). Likewise, the defendants in a Section 12(a)(2) claim must have been the sellers, such that they either passed title or solicited the purchase of a security. *Pinter* v. *Dahl*, 486 U.S. 622, 647 (1988); *Cyrak* v. *Lemon*, 919 F.2d 320, 324-25 (5th Cir. 1990); *In re Azurix Corp. Sec. Litig.*, 198 F. Supp. 2d 862, 892 (S.D. Tex. 2002), *aff'd sub nom. Rosenzweig* v. *Azurix Corp.*, -- F.3d. --, 2003 WL 21242319 at *13 (5th Cir. June 13, 2003) (holding that for a buyer to maintain a § 12(a)(2) claim, the seller "must, at a minimum, directly communicate with the buyer").

Plaintiffs have not alleged that they: (a) purchased the Foreign Debt Securities, (b) in a public offering, or (c) from Citigroup. Accordingly, they lack standing to assert their claims based upon the Foreign Debt Securities.[3]

Plaintiffs cannot avoid this result by purporting to sue on behalf of a class, some of the members of which allegedly purchased the relevant securities, because "[a] plaintiff, including one who is seeking to act as class representative, must have individual standing to assert the claims in the complaint against each defendant being sued by him." *Ramos* v. *Patrician Equities Corp.*, 765 F. Supp. 1196, 1199 (S.D.N.Y. 1991); *see also Paracelsus*, 6 F. Supp. 2d at 631 ("[A]n individual plaintiff who lacks standing to assert a

---

Cal. March 7, 2003).

[3] If plaintiffs lack standing to assert primary violations of the '33 and '34 Acts, it logically follows that they cannot have standing to assert secondary violations of the same, such as claims based on §§ 20(a) of the '34 Act and 15 of the '33 Act. *See e.g. Nehus* v. *Painewebber Inc.*, 91 F.3d 153 (Table) (9th Cir. 1996) ("Because [Plaintiff]

claim on his or her own behalf cannot avoid dismissal by purporting to maintain the action on behalf of a class of which he or she is not a member."); *Greater Iowa Corp.*, 378 F.2d at 789 (plaintiffs who did not purchase the securities in question lacked standing to bring a Section 12(2) claim and "were not entitled to maintain a class action on behalf of [persons who did purchase such securities]"); *see also Bailey* v. *Patterson*, 369 U.S. 31, 33 (1962) (holding that plaintiff seeking to represent class must be member of class he or she purports to represent); *In re Taxable Municipal Bond Sec. Litig.*, 51 F.3d 518, 522 (5th Cir. 1995) ("[I]t is well-established that to have standing to sue as a class representative it is essential that a plaintiff must be a part of that class ...."); *Brown* v. *Sibley*, 650 F.2d 760, 771 (5th Cir. 1981) (internal quotation marks omitted) (holding that named plaintiffs in class action lack standing to sue for injuries to a purported class where the named plaintiffs did not identify that suffered the particular injury).

Here, both the Amended Complaint and plaintiffs' motion for class certification show that plaintiffs lack standing to sue with respect to the Foreign Debt Securities. Accordingly, their claims as to those securities should be dismissed.

II.

PLAINTIFFS' CLAIMS UNDER SECTIONS 12(a)(2) AND 15 BASED ON THE FOREIGN DEBT SECURITIES SHOULD BE DISMISSED BECAUSE THOSE STATUTES DO NOT APPLY TO PRIVATE PLACEMENTS

Section 12(a)(2) of the 1933 Act provides for liability against any person who offers or sells a security "by means of a prospectus" that includes material misrepresentations or omissions. 15 U.S.C. § 77*l*(a)(2). As the Supreme Court held in *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 571, 584 (1995), section 12(a)(2) applies only to

---

failed to plead a primary violation of securities law under section 10(b), he cannot plead secondary liability under section 20(a)").

purchases of securities in a "public offering" requiring the delivery of a prospectus. Because the Foreign Debt Securities were not publicly offered by Citigroup or anyone else, plaintiffs' claim under section 12(a)(2), and their derivative claim under Section 15, must be dismissed with respect to the Foreign Debt Securities.

The Supreme Court held in *Gustafson* that "the word 'prospectus' is a term of art referring to a document that describes a public offering of securities by an issuer or controlling shareholder." 513 U.S. at 584. The Court noted that the "primary innovation of the 1933 Act was the creation of federal duties—for the most part, registration and disclosure obligations—in connection with public offerings." 513 U.S. at 571-72. The Court concluded that "[w]hen the 1933 Act was drawn and adopted, the term 'prospectus' was well understood to refer to a document soliciting the *public* to acquire securities from the issuer;" *id.* at 575, and that "[t]he intent of Congress and the design of the statute require that *§ 12(2) liability be limited to public offerings.*" *Id.* at 578 (emphasis added).

After *Gustafson*, courts have consistently dismissed section 12(a)(2) claims where the securities at issue were not distributed in a public offering. *See e.g., Lewis* v. *Fresne*, 252 F.3d 352 (5th Cir. 2001) (affirming district court's dismissal of § 12(a)(2) claim because loan transaction at issue was private).[4] In particular, courts interpreting *Gustafson* have dismissed Section 12(a)(2) claims alleging misstatements in

---

[4] *See also Laser Mortgage Management, Inc.* v. *Asset Securitization Corp.*, No. 00 Civ. 8100, 2001 WL 1029407 (S.D.N.Y. Sept. 6, 2001) (dismissing § 12(a)(2) claims); *Ravenna* v. *Integrated Food Techs. Corp.*, No. Civ.A. 99-524, 1999 WL 740384 (E.D. Pa. Sept. 15, 1999) (same); *Whirlpool Financial Corp.* v. *GN Holdings, Inc.*, 67 F.3d 605, 609 n.2 (7th Cir. 1995) (noting that alternative ground for affirming dismissal of § 12(a)(2) claim based on misrepresentations in private placement memorandum is fact that sale was not public offering).

private placement memoranda. *See, e.g., Glamorgan Coal Corp.* v. *Ratner's Group PLC*, No. 93 Civ. 7581, 1995 WL 406167 (S.D.N.Y. July 10, 1995) (dismissing Section 12(2) claim).[5] Courts have specifically held Section 12(a)(2) inapplicable where, as here, the private placement memorandum: (1) repeatedly explains that the offering is private and only available to qualified purchasers,[6] *Vannest* v. *Sage, Rutty & Co.*, 960 F. Supp. 651, 655 (W.D.N.Y. 1997) (granting summary judgment dismissing Section 12(2) claim); and (2) clearly states that the memorandum is to be used on a confidential basis and only by the recipient of the memorandum,[7] *Kainos Labs., Inc.* v. *Beacon Diagnostics, Inc.*, No. C-97-4618, 1998 WL 2016634, at *4-5 (N.D. Cal. Sept. 14, 1998) (granting motion to dismiss Section 12(2) claim).

The Osprey I, Yosemite I and ECLN Notes were issued in a private offering pursuant to Rule 144A and/or overseas pursuant to Regulation S.[8] In adopting

---

5 *Cf. In re JWP Inc. Sec. Litig.*, 928 F. Supp. 1239, 1259 (S.D.N.Y. 1996) (granting summary judgment to defendants on section 12(a)(2) claim by concluding that private placement memorandum is not "prospectus").

6 *See e.g.* Hurwitz Dec., Ex. A [Offering Memorandum, Yosemite Securities Trust I, Linked Enron Obligations (LEOs) ("Yosemite I Offering Memorandum"), Nov. 4, 1999], Cover Page ("The Notes . . . are being offered and sold in the United States only to 'Qualified Institutional Buyers' . . ."). The offering memoranda for the other private placements referenced in the Amended Complaint, namely Osprey I, Yosemite II, and the various Enron Credit Linked Note ("ECLN") offerings, contain identical or substantially similar language. *See* Hurwitz Dec., Exs. B-G.

7 *See* Hurwitz Dec., Ex. A, at iii ("[T]his Memorandum is confidential . . . [and] personal to each offeree to whom it has been delivered by the Trust"). The offering memoranda for the Osprey I, Yosemite II, and the ECLN offerings, contain identical or substantially similar language. *See* Hurwitz Dec., Exs. B-G.

8 *See* Hurwitz Dec., Ex. A, Cover Page ("The Notes . . . are being offered and sold in the United States only to "Qualified Institutional Buyers" (as defined under Rule 144A under the Securities Act) . . . and outside the United States in accordance with Regulation S under the Securities Act."). The offering memoranda for the Osprey I

Rule 144A, the SEC has noted that the 1933 Act was remedial legislation designed to protect "unsophisticated, individual investors . . . [d]espite measurable institutional presence in the capital markets." Securities Act Release No. 6806, [1988-1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,335, at 89,534-89,535 (citation omitted). Thus, the SEC concluded that "[t]he key to the analysis of proposed Rule 144A is that certain institutions can fend for themselves and that, therefore, *offers and sales to such institutions do not involve a public offering*." *Id.* at 89,539 (emphasis added).

Thus, Rule 144A offerings are private transactions that "are not subject to the registration provisions of the Securities Act," Securities Act Release No. 6862, [1989-1990 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 84,523, at 80,639 (Apr. 23, 1990), because they are "intended to cover only resales to institutions that are sophisticated securities investors." *Id.* at 80,641; *see also In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 431-32 (S.D.N.Y. 2001) (granting motion to dismiss claims under Sections 11 and 12(a)(2) asserted by purchasers of 144A bonds); Elliott J. Weiss, *Securities Act Section 12(2) After Gustafson v. Alloyd Co.: What Questions Remain?*, 50 Bus. Law. 1209, 1225 (Aug. 1995) ("[T]he SEC lacks authority to bring within the coverage of section 12(2) any transaction in which the seller is not required to issue a

---

and the ECLN offerings, *see* Hurwitz Dec., Exs. C-G, contain identical or substantially similar language. The Yosemite II Notes were offered outside the United States pursuant to Regulation S, and privately placed with U.S. or U.S.-based buyers, to the extent any of the Notes were thus sold. *See* Hurwitz Dec., Ex. B, Cover Page ("The Notes are being offered and sold only outside the United States in accordance with Regulation S under the Securities Act and may not be offered or sold in the United States or to U.S. persons (as defined in Regulation S under the Securities Act) except pursuant to an exemption from, or in a transaction not subject to, the registration requirements of the Securities Act.").

'prospectus.' A Rule 144A transaction is such a transaction. A person who sells securities in such a transaction therefore has no liability under section 12(2).").

Accordingly, because the Foreign Debt Securities were all privately placed through private placement memoranda that were marked as private, confidential and personal to the recipient, and which declared that the securities were not registered and could only be sold to qualified purchasers, section 12(a)(2) does not apply.

Plaintiffs attempt to evade the force of these precedents by alleging in conclusory fashion that the Foreign Debt Securities were "publicly traded" on the Luxembourg Exchange, *see* Am. Cplt. ¶¶ 641.3, 641.7, 641.12, 641.17, 641.21, 641.25, 641.29, 641.33, but that allegation is irrelevant. Under *Gustafson*, Section 12(a)(2) liability is not premised on securities being publicly traded subsequent to the initial offering, but on whether the offering itself was initially public and pursuant to a "prospectus." *See* 513 U.S. at 575, 578. Indeed, issuers in private offerings routinely list the securities on the Luxembourg stock exchange, with no suggestion that the securities thereby become subject to liability under Section 12(a)(2), as "offshore transactions made in compliance with Regulation S will not be integrated with domestic offerings that are otherwise exempt from registration under the Securities Act." Robert W. Helm Dechert, *Understanding the Evolving World of Capital Market & Investment Management Products,* CREATING, MANAGING AND DISTRIBUTING OFFSHORE INVESTMENT PRODUCTS: A LEGAL PERSPECTIVE, 1360 PLI/Corp 243. Here, each Foreign Debt Securities offering was "made in compliance with Regulation S," *id.*, and was "otherwise exempt" from the registration requirements of the 1933 Securities Act. *Id.*

Because plaintiffs do not and cannot allege that the Foreign Debt Securities were issued in a public offering pursuant to a prospectus, they cannot state a claim for relief under section 12(a)(2). Moreover, as discussed above, because plaintiffs are unable to state a claim under Section 12(a)(2), it follows that it is also unable to show a secondary violation under Section 15. *See* n. 3, above.

III.

ALL CLAIMS AGAINST CITIBANK, N.A., SALOMON SMITH BARNEY INC. AND SALOMON BROTHERS INTERNATIONAL LIMITED ARE TIME BARRED

Finally, the claims asserted against Citibank, SSB and SBIL should be dismissed because they are barred by the applicable one-year statute of limitations.[9]

In *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991), the Supreme Court held that an action based on Section 10(b) of the '34 Act "must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation." *Id.* at 364. This same limitations period applies to each of the Plaintiffs' claims. *See* 15 U.S.C. § 77m (indicating that the same limitations period applies to § 12(a)(2)); *Herm v. Stafford*, 663 F.2d 669, 679 (6th Cir. 1981) (holding the same for §15 claims); *Theoharous* v. *Fong*, 256 F.3d 1219, 1228 n.12 (11th Cir. 2001) (finding the same for § 20(a) claim). It is well-established in this Circuit that "[t]he one-year 'discovery' limitations period begins to run on the date that the plaintiff discovers or in the exercise of reasonable diligence should have discovered" the alleged misconduct giving rise to the cause of action. *Reed* v. *Prudential Sec. Inc.,*

---

[9] Citigroup incorporates by reference the discussion of statute of limitations in the memoranda of the other bank defendants in support of their motions to dismiss, filed June 18, 2003.

875 F. Supp. 1285, 1288 (S.D. Tex. 1995) (citing *Jensen* v. *Snellings*, 841 F.2d 600, 606 (5th Cir.1988) and *Vigman* v. *Community Nat'l Bank & Trust Co.*, 635 F.2d 455, 459 (5th Cir.1981)).

In the Consolidated Complaint filed on April 8, 2002, Plaintiffs failed to assert claims against Citibank, SSB, or SBIL, although the Complaint itself revealed that plaintiffs had actual knowledge of their alleged involvement in the matters at issue.[10] The First Amended Complaint, which added claims against these defendants, was filed on May 14, 2003, more than one year after the Consolidated Complaint was filed, and more than one and one half years after Enron announced its restatement of earnings on October 16, 2001. *See* Am. Cplt. ¶ 61. Thus, plaintiffs' claims against those defendants all fall well beyond the expiration of the one year "discovery" prong of the statute of limitations and should be dismissed.[11]

---

[10] The Consolidated Complaint described Citigroup as "a large integrated financial services institution that *through subsidiaries and divisions (such as Salomon Smith Barney* (collectively "Citigroup")) provides commercial and investment banking services . . . ." First Consolidated Complaint ¶ 101 (emphasis added). The Consolidated Complaint also quoted Enron releases which specifically referred to Citigroup's subsidiaries by name. *See e.g.*, *Id.* at ¶ 383. Moreover, the Consolidated Complaint and offering documents referenced therein described the role of Citigroup's subsidiaries in the offerings. *Id.* ¶¶ 677-680, 685. Finally, Citigroup pointed out to plaintiffs that they sued the wrong party in its Motion to Dismiss the Consolidated Complaint. *See* Memorandum in Support of Motion to Dismiss by Citigroup at p. 10 n.3. ("[A]ny business dealings with Enron were those of Citigroup's subsidiaries, including Citibank N.A., and Salomon Smith Barney, Inc.") Citigroup's motion to dismiss was filed on May 8, 2002, more than a year prior to the filing of the First Amended Complaint.

[11] In addition to the arguments asserted in the body of this memorandum, the plaintiffs' "control person" claims against Citigroup Inc. should be dismissed because Plaintiffs have failed to allege any "particularized facts as to [Citigroup's] culpable participation in (excising control over) the 'fraud [allegedly] perpetrated by [its subsidiaries]." *In re Enron Corp*, 235 F. Supp. 2d 549, 598 (S.D. Tex. 2002) (citations omitted); *Dennis* v. *General Imaging Inc.*, 918 F.2d 496, 509 (5th Cir.

Conclusion

For the foregoing reasons, Citigroup's Motion to Dismiss should be granted.

Respectfully submitted,

WILSHIRE, SCOTT & DYER, P.C.

By: _____
Jacalyn D. Scott
Texas Bar No. 17899900
S.D. Tex. ID # 3007
3000 One Houston Center
1221 McKinney
Houston, Texas 77010
Telephone: (713) 651-1221
Facsimile: (713) 651-0020

Attorney-in-Charge for Defendants Citigroup Inc. Citibank N.A., Salomon Smith Barney Inc. and Salomon Brothers International Limited

---

1990) (demonstrating a *prima facie* violation of Section 15 requires plaintiff to show that the controlling person "had actual power or influence over the controlled person and [] induced or participated in the alleged violation."); *Novak* v. *Kasaks*, 997 F. Supp. 425, 435 (S.D.N.Y. 1998) (dismissing Section 20(a) claim against a parent holding company, explaining that control person liability is not pled sufficiently simply by alleging that an entity is the parent of an alleged violator). Plaintiffs are required to "allege some facts beyond a defendant's position or title that show that the defendant had actual power or control over the controlled person." *Enron*, 235 F. Supp. 2d at 595 (citing *Dennis*, 918 F.2d at 509-10). Plaintiffs do not set forth any facts demonstrating that Citigroup exercised control over the acts of its subsidiaries, much less that Citigroup culpably participated in or induced the challenged conduct of Citigroup's subsidiaries. Therefore, plaintiffs' control person claims against Citigroup Inc. under Sections 15 and 20 must be dismissed.

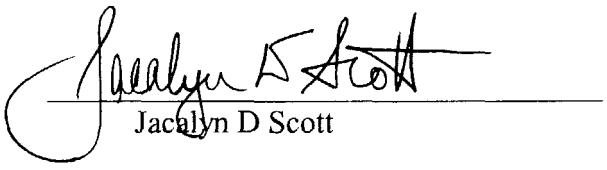
Of Counsel:

Brad S. Karp
Mark F. Pomerantz
Richard A. Rosen
Michael E. Gertzman
Claudia L. Hammerman
Jonathan H. Hurwitz
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019-6064
Telephone: (212) 373-3000
Facsimile: (212) 373-3990

Eugene B. Wilshire
Wilshire Scott & Dyer P.C.
3000 One Houston Center
1221 McKinney
Houston, Texas 77010
Telephone: (713) 651-1221
Facsimile: (713) 651-0020

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum In Support of Motion to Dismiss and the Declaration of Jonathan H. Hurwitz in Support of Citigroup Defendants' Motion to Dismiss, with Exhibits were served on all counsel on the attached service list electronically via the *www.esl3624.com* website or as otherwise indicated in the Court's prior orders upon this 18th day of June, 2003.



Jacalyn D Scott